## BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

MATTHEW A. LAWSON,

Claimant,

VS.

BENTON SAND & GRAVEL, INC.,

Employer,

and

UNITED FIRE & CASUALTY COMPANY, :

Insurance Carrier, Defendants.

File No. 5066379

ORDER NUNC PRO TUNC

On February 24, 2020, defendants applied for an Order Nunc Pro Tunc and/or Request for Rehearing. The basis for this motion is two fold. First, the Order section of the Arbitration Decision reflects a 15 percent impairment to the right lower extremity. The Arbitration Decision body incorrectly cites that Dr. Gibbons assigned a 15 percent impairment to the right lower extremity when he assessed a 15 percent impairment to the foot and a 9 percent impairment to the right lower extremity.

The statement that Dr. Gibbons assigned a 15 percent impairment to the right lower extremity is a misstatement of the record. However, inasmuch as Dr. Gibbons' impairment assessment was 9 percent to the right lower extremity and the undersigned relied on Dr. Gibbons' opinion, the permanent scheduled member disability is properly 15 percent based on the testimony of the claimant, the concurrent actions of the claimant, as well as Dr. Gibbons' assessment.

Functional disability is a fact question for the commissioner. <u>See Sherman v. Pella Corp.</u>, 576 N.W.2d 312, 322 (lowa 1998). "Functional disability is arrived at by determining the impairment of the employee's bodily function and is limited to the loss of the physiological capacity of the body or body part." <u>Miller</u>, 525 N.W.2d at 420. "The determination of functional disability is not limited to impairment ratings established by medical evidence." <u>Id</u>. at 421.

"The commissioner may use either medical or nonmedical evidence to determine the extent of disability of a scheduled member." <u>Sherman</u>, 576 N.W.2d at 322. "[L]ay testimony could buttress the medical testimony and would be relevant and material in

determining the cause and extent of the employee's injuries." <u>Id</u>. "[W]hen relying on medical evidence, the commissioner may use the <u>Guides</u> for determining the disability of a scheduled member." <u>Id</u>. (citing rule 876 IAC 2.4, which allows use of the <u>Guides</u> to determine "[t]he extent of loss or percentage of permanent impairment").

The arbitration ruling, adopted as final agency action in this regard, cites the proper legal standard, specifically stating that the "loss of use of a particular scheduled member may entail more than a medical rating pursuant to standardized guides for evaluating permanent impairment. The ruling also acknowledges that a claimant's testimony and demonstration of difficulties may be considered in determining the actual loss of use." Horn v. Cummins Filtration-Lake Mills, 841 N.W.2d 356 (lowa Ct. App. 2013).

Based on the foregoing, defendants' motion for rehearing is denied. However, the scrivener's error on page 16 shall be corrected to state "Dr. Gibbons assigned a 9 percent impairment rating to the right lower extremity."

THEREFORE IT IS ORDERED defendants' motion for rehearing is denied. The scrivener's error on page 16 shall be corrected to state "Dr. Gibbons assigned a 9 percent impairment rating to the right lower extremity."

Signed and filed this \_\_28<sup>th</sup> \_ day of February, 2020.

JENNIFER S. GERRISH-LAMPE DEPUTY WORKERS' COMPENSATION COMMISSIONER

The parties have been served, as follows:

Jenna Green (via WCES)

Cory Abbas (via WCES)